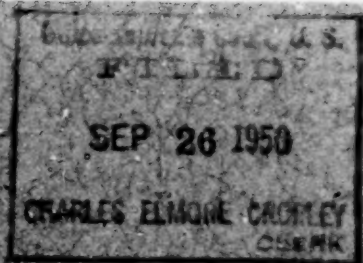


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SUPREME COURT, U.S.



No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, APPELLANT

UNITED STATES GYPSUM COMPANY, ET AL,

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR THE UNITED STATES

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PRIOR OPINIONS

The opinions rendered by the members of the three-judge district court on the Government's motion for summary judgment (*R.* 102-104) have not been reported. The opinion of the district court on appellees' motion to strike a paragraph of the amended complaint (*R.*¹ 369) and its opinion

¹ The printed record on the previous appeal in this case (No. 13, Oct. Term, 1947) is part of the record in the present appeal (*R.* 199). When the letter "R" is italicized, the reference will be to the record on the prior appeal, and when it is not italicized, the reference will be to the record printed on this appeal.

on appellees' motion to dismiss the complaint under Rule 41(b) of the Federal Rules of Civil Procedure (*R.* 3933) are reported, respectively, in 53 F. Supp. 889 and 67 F. Supp. 397. The opinion of this Court reversing the district court's judgment of dismissal is reported in 333 U. S. 364.

JURISDICTION

The judgment of the district court was entered on November 7, 1949 (*R.* 185-191). The petition for appeal was filed and allowed on January 6, 1950 (*R.* 194-195). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. Probable jurisdiction was noted on May 29, 1950 (*R.* 376).

QUESTIONS PRESENTED

This Court has adjudged that appellees have illegally restrained and monopolized interstate commerce in gypsum board by acting in concert to fix prices and to regiment their industry under patent licenses. It has also adjudged that the gypsum board patents of appellee United States Gypsum Company have been used as a means for thus illegally restraining and monopolizing commerce. The appeal presents the following questions as to the relief requisite to prevent further violations of the Sherman Act and to dissipate the effects of appellees' past illegal conduct:

1. Whether the judgment should prohibit appellees from acting in concert to fix prices in the gypsum board industry and from continuing, pursuant to such a price-fixing agreement, acts and practices which the appellees have used as means for effectuating price control and regimentation of trade in the gypsum board industry.

2. Whether the judgment should require appellee United States Gypsum Company to license its present and future gypsum board patents at reasonable royalty rates and upon other terms fair and reasonable to those licensed thereunder.

The other questions presented by the appeal are:

3. Whether the judgment should provide that representatives of the Department of Justice may, subject to appropriate limitations, inspect the books and records of the defendant companies relating to matters contained in the judgment and interview their officers and employees regarding such matters.

4. Whether the adjudication of violation of the Sherman Act should include the individual defendants as well as the defendant companies.

5. Whether the judgment should require appellees to pay all taxable costs of the proceeding or only 50% thereof.

STATUTE INVOLVED •

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * [15 U. S. C. 1.]

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * * . [15 U. S. C. 2.]

* * * * *

Sec. 4 [as amended by the Act of March 3, 1911, Sec. 201, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * * . [15 U. S. C. 4.]

STATEMENT

Prior Proceedings in the Case

This is a civil action instituted by the United States in 1940 under Section 4 of the Sherman Act. The complaint charged appellees, six corporations and seven individuals, with conspiring to fix prices on patented gypsum board and unpatented gypsum products, and otherwise to restrain and monopolize interstate commerce in gypsum board and other gypsum products, in violation of Sections 1 and 2 of the Sherman Act. An expediting certificate was filed under the Expediting Act of February 11, 1903, as amended, and a three-judge district court was appointed. On April 20, 1944, at the close of the presentation of the Government's evidence, the appellees moved to dismiss the complaint under Rule 41(b) of the Federal Rules of Civil Procedure upon the ground that on the facts and law the Government had shown no right to relief. On June 15, 1946, the district court held that this motion should be granted, and in August 1946 it filed findings of fact and conclusions of law and entered judgment dismissing the complaint.

On appeal, this Court unanimously reversed the judgment of dismissal and remanded the case for further proceedings in conformity with its opinion. *United States v. U. S. Gypsum Co.*, 333 U. S. 364. The Court's basic rulings were: (1) The industry-wide license agreements, entered into with knowl-

edge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution provided for and achieved through the license agreements and the price bulletins issued pursuant to these agreements, "fully" established concert of action, constituting conspiracy, to achieve ends prohibited by the Sherman Act. 333 U. S. at pp. 389, 393, 400. (2) Such conduct, regardless of motive, plainly violates the Sherman Act in the absence of sanction under patent law. *Id.*, at pp. 393, 400. (3) Patent exploitation of the kind undertaken by the defendants is "beyond any patent privilege." *Id.*, pp. 391, 400-401.

The Court, dealing with the question whether the defendants' conduct came within the rights of patentees as those rights were defined in *United States v. General Electric Co.*, 272 U. S. 476, said (p. 400):

That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized.

But the Court went further and held that even if only the central core of what the defendants had

done were given consideration, the *General Electric* case affords no cloak of immunity. It said (P. 401):

~~Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices.~~

The grounds for this conclusion were summed up in these words (*ibid.*):

The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly.

The first of the foregoing quotations reflects the conclusions reached by the Court as to certain facts shown by the Government's documentary evidence. Earlier in its opinion the Court had stated that it unmistakably appeared from this evidence that the defendants had defined "in minute detail" both the prices and terms of sale for gypsum board, adopted a delivered price basing point system, specified board sizes, prescribed minimum quantities, regulated place of delivery, prohibited consignment sales, eliminated an important class of

jobbers, and attempted to stabilize the price of plaster, an unpatented gypsum product. 333 U. S. 364, at pp. 382-383, 398, 399.

Following remand of the case to the district court, the Government requested a pre-trial conference to determine what factual issues remained for trial and what categories of evidence the defendants intended to adduce (R. 2-3). At a hearing on this matter the district court, in order to have a basis for ruling on the future course of the proceeding, requested that the Government file a motion for summary judgment and that the defendants file a proffer of proof (R. 22-23, 26). Such motion (R. 144)² and such proffer (R. 145-160)³ were promptly filed. On June 29, 1948, the court heard argument on the Government's motion in relation to defendants' proffer (R. 30, 32-102), and orally ruled that the proffered proof gave rise

² The Government's motion prayed for summary judgment in its favor, or, if such judgment should not be rendered on the whole case or for all the relief asked and a further trial should be necessary, that the court ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just. See Rule 56(d) of Federal Rules of Civil Procedure.

³ Two of the defendant companies, National Gypsum Company and Ebsary Gypsum Company, Inc., and their respective presidents, defendants Melvin H. Baker and Frederick G. Ebsary, did not join in the proffer made by the other defendants (R. 31-32). The Celotex Corporation also filed a short supplementary proffer of proof (R. 31, 160-161).

to no genuine issue as to any fact material to an adjudication that the defendants had violated the Sherman Act, and that summary judgment should be granted (R. 102-103). Judge Stephens dissented from these rulings (R. 103-104, 191-194).

Thereafter the Government filed proposed findings of fact and conclusions of law (R. 207-249) and a proposed judgment (R. 250-259). Appellee United States Gypsum Company, which will sometimes be referred to as USG, filed, subject to its objection to entry of any judgment for the plaintiff (R. 163), proposed findings and conclusions (R. 359-373) and a proposed judgment (R. 354-359). Article VI of USG's proposed judgment imposed upon USG a limited requirement to license certain of its gypsum board patents (R. 358). The article provided for court approval of certain forms of license agreement, and provided that USG might satisfy its obligation to license by tendering an agreement containing the provisions of the applicable approved form of agreement (*ibid.*).⁴

On November 7, 1949, the district court, without making findings of fact or conclusions of law and without rendering an opinion, entered a final judgment (R. 185-191). It differed only in minor respects from the judgment which USG had pro-

⁴ USG filed forms of license agreement which it proposed that the court approve if it should adopt Article VI of USG's proposed judgment (R. 164-185).

posed and its principal provisions may be summarized as follows:

The "defendant companies," but not the individual defendants, are adjudged to have violated Sections 1 and 2 of the Sherman Act (Art. III).⁵ The patent license agreements which were in effect between USG and any other defendant at the time the Government's complaint was filed are declared null and void (Art. IV).⁶ Each defendant company is enjoined (1) from further performing any of the canceled license agreements, (2) from agreeing with another defendant for the purpose or with the effect of continuing or reviving "any monopolistic practice," and (3) from agreeing with any other defendant in restraint of trade and commerce in gypsum board among the states in the eastern territory of the United States "by license agreements to fix, maintain, or stabilize" the prices of such board or the terms or conditions of sale thereof (Art. V). Moreover, the prohibition as to restraint of commerce in gypsum board is limited to board which embodies an invention claimed in one or more of the license agreements which the judgment declared to be unlawful.⁷

⁵ "Defendant companies" are defined as the six corporate defendants plus Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company (Art. II, par. 1).

⁶ The judgment particularizes these agreements (Art. II, par. 4).

⁷ Paragraph (3) prohibits restraint of trade in "gypsum board." The prohibition has the narrow limits stated above, because of the definitions of Article II of the judgment. It is

The judgment orders USG to grant, upon application made within 90 days from the judgment's effective date, a non-exclusive license under USG's presently owned gypsum board patents, at a royalty not in excess of the royalty on the same article or process fixed in the license agreements canceled by the judgment (Art. VI). USG is permitted to satisfy this obligation by tendering a license agreement containing the provisions set forth in the forms of agreement "ordered filed herein," and "hereby approved" (Art. VIII). The forms of agreement which the court thereby approved provide for licensing under only nine patents (R. 165, 171, 175-176, 179-180, 185), and they are verbatim the forms of license agreements submitted to the district court by USG (R. 164-185, 194).

The approved forms of license agreement also give to USG a broad right to inspect and make copies of all books and records of the licensee relating to sale of gypsum board embodying any invention covered by the licensed patent or patents.

there provided (R. 187) that, as used in the judgment, "gypsum board" shall mean board "embodying any of the inventions or improvements set forth and claimed in any of the Patents"; "Patents" shall mean patents and patent applications owned by USG "which are described in the Patent Licenses, as hereinafter defined"; and "Patent License" shall mean the patent license agreements which were in effect between USG and each of the other defendant companies at the time that the Government's complaint was filed.

Each form of agreement contains substantially the following provision (R. 167, 172, 176-177, 181):

Licensor, or its duly authorized representative, shall have the right at all reasonable times to inspect the books of account and records of Licensee referred to in Paragraph 4 hereof, and to make copies thereof and memoranda therefrom, *provided, however*, that upon written request of Licensee, such examination shall be made by a certified public accountant agreed upon between the parties hereto * * *.

The judgment further provided that the defendant companies should pay 50% of the taxable costs of the proceeding (Art. X).

Following entry of the final judgment which we have described, both the Government and USG⁸ appealed to this Court. The basis of USG's appeal was that, on the record as it stood when the district court granted the Government's motion for summary judgment, there was substantial controversy between the parties as to facts material to the issue of defendants' violation of Sections 1 and 2 of the Sherman Act, and that the district court therefore erred in entering judgment against the defendants on such motion. On May 29, 1950, this Court entered an order dismissing USG's appeal. 339 U. S. 959.

The ground of the Government's appeal was that the final judgment of the district court failed to

⁸ The individual defendants Sewell L. Avery and Oliver M. Knode, who are officers of USG, joined in USG's appeal.

give adequate relief against the defendants. On May 29, 1950, this Court noted probable jurisdiction of the Government's appeal, and further ruled as follows (339 U. S. 960) :

Article III of the decree of the District Court of November 7, 1949, reading as follows: "The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Antitrust Act," is affirmed. The corporate defendants and Samuel M. Gloyd, doing business as Texas Cement Plaster Company, are enjoined, pending further order of this Court, from (1) enforcing in any manner whatsoever the provisions of their current license agreements fixing, maintaining or stabilizing prices of gypsum board or the terms and conditions of sale thereof, and (2) from entering into or performing any agreement or understanding in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain or stabilize prices of gypsum board or by license or other concerted action arranging the terms and conditions of sale thereof.

Judgment Provisions Requested on This Appeal

The Government is seeking particular modifications in the judgment entered by the district court

rather than blanket substitution of the judgment which it proposed in the district court. In order to give concreteness to the changes which we request and in order to put the matter before the Court in the form of a complete judgment, we have set forth in the Appendix (*infra*, pp. 65-75) a proposed judgment which contains the provisions sought by the Government. It follows the structure of the district court's judgment and, for the convenience of the Court, we herewith annotate it to the judgment entered below.

Articles I, IV, VII and X. These articles are the same as Articles I, IV, VII and IX, respectively, of the district court's judgment apart from substituting the word "judgment" for the word "decree."⁹

Article II. This defines, in the same manner as Article II of the district court's judgment, the words "defendant companies" and the license agreements which are declared illegal by Article I. It has a different definition of "patents" and

⁹ Article I of the proposed judgment sets forth the court's jurisdiction to act in the case. Article IV adjudges the illegality of USG's license agreements with other defendants. Article VII exempts from the judgment, aside from its compulsory licensing requirements, activities of the defendants authorized by any act of Congress. Article X reserves to the court jurisdiction to construe and enforce the provisions of its judgment.

Article VII was not assigned as error even though the Government is generally opposed to incorporating into a Sherman Act judgment exemption provisions of this kind, because they lead to uncertainty and ambiguity in the application of the obligations imposed by the judgment.

of "gypsum board," and it also defines "gypsum products." The defined words are used in Articles V and VI, and our proposed changes in definition are designed to enlarge the scope of the prohibitions or requirements of these articles. The proposed changes in Article II are therefore wholly ancillary to our proposed changes in Articles V and VI.

Article III. The adjudication of violation of the Sherman Act made therein is the same as that in Article III of the judgment below except that in our proposed article the adjudication applies to both the individual defendants and the defendant companies.

Article V. The injunctive provisions of this article are a substitute for those of Article V of the district court's judgment. The proposed substitute is based upon, and incorporates the substance of, Section V of the judgment proposed by the Government in the district court, as indicated in detail below.¹⁰

¹⁰Section V (R. 252-253) provided for enjoining the defendants from acting in concert to do any of the things described in 10 subparagraphs: Proposed Article V contains a broad prohibition of price-fixing agreements and six supplementary prohibitions. The Government believes that the initial, basic prohibition of Article V sufficiently covers subparagraphs 1 and 10 of Section V and, together with supplementary subparagraph 5, sufficiently covers subparagraphs 6 and 8 of Section V. The other subparagraphs of Section V are embodied in the subparagraphs of Article V as follows, the latter being shown in parenthesis: 2(1), 3(2), 4(4), 5(5), 7(3), 9(6).

Article VI. This article provides for compulsory licensing of USG's gypsum board patents and it is a substitute for the provisions of Articles VI and VIII of the district court's judgment. Its requirements are essentially those of Section VI of the judgment which the Government asked the district court to enter. See R. 254-256.

Article VIII. This article, which has no counterpart in the district court's judgment, provides that representatives of the Department of Justice may, subject to certain limitations, inspect the records of defendant companies and interview their officers and employees. It differs only verbally from Section XI of the judgment proposed by the Government in the district court. See R. 258.

Article IX. This differs from Article X of the judgment below only in that it requires the defendants to pay all, rather than 50%, of the taxable costs of the proceeding.

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

1. In failing to adjudicate that each individual defendant has violated Sections 1 and 2 of the Sherman Act.
2. In limiting the prohibitions of Article V (3) of its judgment to restraints of trade involving only "gypsum board" in the eastern United States and

in limiting these prohibitions to restraints of trade effected only by "license agreements."

3. In not enjoining any two or more defendants from agreeing, combining or conspiring with each other to eliminate price competition in the sale of gypsum board or gypsum products, to stabilize the prices thereof, to suppress any class of distributor thereof, or to suppress the production of unpatented gypsum products.

4. In limiting the requirement imposed upon United States Gypsum Company by Article VI (1) of its judgment to 90 days after the effective date thereof, and in limiting such requirement to the nine patents referred to in the forms of agreement which the court "approved" and "ordered filed herein" (Article VIII).

5. In not providing that each license granted pursuant to the requirements of Article VI (1) of the judgment shall be at a reasonable royalty, to be determined, in the event of disagreement, by the court.

6. In providing in Article VIII of its judgment that tender by United States Gypsum Company of a license containing the terms and conditions set forth in the applicable form of agreement which the court "approved" and "ordered filed herein" shall constitute compliance by United States Gypsum Company with the provisions of Article VI of the judgment.

7. In providing in the first of the license forms which the court approved that the licensee shall make a monthly report to United States Gypsum Company of the "quantity" of all gypsum board manufactured by it under the licensed patents, together with the "selling price" thereof, and that United States Gypsum Company may inspect the books and records of the licensee and make copies thereof, subject to the proviso that, upon the licensees' request, such examination shall be made by a certified public accountant.

8. In not entering judgment against the defendants for the full taxable costs of the proceeding.

9. In not including in its judgment provisions corresponding to those of Sections V, VI, and XI of the judgment proposed by the plaintiff.

SUMMARY OF ARGUMENT

I

1. It is established that when the defendants in a proceeding under Section 4 of the Sherman Act are found to have violated the Act, the judgment entered against them shall be of sufficient breadth and specificity to provide effective safeguards against continuation or renewal of their past illegal conduct. *Local 167 v. United States*, 291 U. S. 293. The prohibitions of the judgment are therefore not to be confined to acts of the precise kind found to have been committed, but should embrace acts of a similar kind and character and the means by which

defendants' unlawful restraints or monopolization have been achieved. *International Salt Co. v. United States*, 332 U. S. 392.

2. The district court's judgment, tested by these accepted doctrines, is patently insufficient. Of its three injunctive provisions, the first merely bars the carrying out of the patent license agreements which the judgment cancels. The second, directed against "any monopolistic practice," is wholly ineffective as a deterrent because of its generality and indefiniteness; citation for contempt thereof would practically entail retrial of a Sherman Act case. The third is inadequate because it prohibits only price fixing by license agreements on gypsum board embodying the invention of particular USG patents and sold in the eastern part of the United States. It would not prevent appellees from fixing prices by means other than that hitherto employed, or on gypsum board not embodying the particular inventions, or on other gypsum products, or on gypsum products (including board) sold in the Pacific Coast area.

3. The judgment which the Government proposes would prohibit appellees from participating in any agreement or understanding to fix or stabilize prices or terms of sale of gypsum products by concert of action of any kind. It would thus close the door to price fixing through means other than patent license agreements, to price fixing on gypsum products other than board, and to price fix-

ing outside of "eastern territory." It would also prohibit engaging in, pursuant to price fixing, acts and practices which the appellees have used in support and furtherance of price control and regimentation of trade.

II

The compulsory licensing provisions of the district court's judgment are wholly inadequate. It requires such licensing only as to those who apply ~~therefor~~ within 90 days of the judgment's effective date and only as to nine patents of USG, four of which will have expired by the end of 1950. The royalty to be paid is that fixed for the particular patent or patents in the price-fixing licensing agreements which the judgment cancels. It provides for licensing only upon terms respecting inspection of the licensee's books and records by USG which are competitively disadvantageous to USG's licensees.

In the circumstances of this case there is clear need for compulsory licensing which, unlike that provided by the district court's judgment, is more than *pro forma*. USG is the dominant producer of gypsum board and it has utilized patents, which ostensibly controlled the technology of the gypsum board industry to maintain "rigid control over the prices and terms of sale of virtually all gypsum board." Its unvarying policy has been to use its patent power to this end and, unless the judgment commands otherwise, it will continue to use its patent power acquired as a part of the conspiracy, to exclude others from the industry.

The compulsory licensing provisions of our proposed judgment are designed to dissipate the effects of the appellees' long-continued illegal restraint of trade. It would require USG to license its present and future gypsum board patents at a reasonable non-discriminatory rate of royalty and on terms otherwise fair and reasonable to USG's licensees. Such requirements have the support of both precedent and principle. Where violation of the Sherman Act has been grounded on the defendants' misuse of patents, compulsory licensing of present and future patents is an appropriate remedy. *Hartford-Empire Co. v. United States*, 323 U. S. 386; *United States v. National Lead Co.*, 332 U. S. 319. Application of this remedy comes within the general principle that the courts' duty to enforce the statute may require undoing the effects of the past illegal conduct in order effectually to neutralize its continuing operating force. As this Court has said, a public interest to be served by suits under Section 4 of the Act is that they "effectively pry open to competition the market that has been closed by defendants' illegal restraints." *International Salt Co. v. United States*, 332 U. S. 392, 401.

III

The district court rejected the Government's request that it provide in its judgment that representatives of the Department of Justice may inspect, subject to appropriate limitations, the books

and records of defendant companies relating to matters covered by the judgment and may interview their officers and employees as to such matters. Such authorization, which we ask to have included in the judgment, is substantially identical with the one which this Court considered and approved in *United States v. Bausch & Lomb Co.*, 321 U. S. 707, and again approved in the *Hartford-Empire* case, *supra*.

IV

The district court's adjudication of violation of the Sherman Act does not include the individual defendants, who helped to formulate and carry out the unlawful scheme which the judgment condemns. If the judgment below is left unchanged it will stand as a dangerous precedent for the false proposition that the guilt of a corporation somehow insulates from the prohibitions of the Act officers of the corporation who have been parties to the violation. We ask that the adjudication of violation of the statute include the individual defendants.

V

The district court's judgment provides that the defendant companies shall pay half the taxable costs of the proceeding whereas under our proposed judgment they would pay the full taxable costs. The Federal Rules of Civil Procedure provide that costs are to be allowed "as of course" to the pre-

vailing party unless its conduct of the litigation has unnecessarily increased the costs. Here there have been no acts of this kind by the Government which would warrant departure from the usual rule for taxation of costs, and whatever special equities exist as between the parties run in favor of the Government.

ARGUMENT

Introductory

The relief which the Government asks this Court to approve differs substantially from that granted by the district court. We submit that there is ample warrant for the recasting of relief which we propose.

In a proceeding of the kind here involved the district court is vested with a wide range of discretion in moulding the judgment to the exigencies of the particular case, and where the findings of violation are sustained on appeal the appellate court will not recast the judgment except upon a showing of abuse of discretion. But in cases where the judgment entered below does not adequately protect the public interest, this Court has not hesitated to direct a revamping of the judgment.¹¹ *Standard Oil Co. v. United States*, 221 U. S. 1, 78-82; *United States v. American Tobacco Co.*, 221 U. S. 106, 184-

¹¹ Modification is likewise directed in the converse situation, where the provisions of the district court's judgment are found to exceed the limits of appropriate relief and to be essentially punitive in character. *Hartford-Empire Co. v. United States*, 323 U. S. 386, 410-435.

188; *United States v. Crescent Amusement Co.*, 323 U. S. 172, 185-187; *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 161-166.

We later point out gross and patent inadequacies in the judgment entered in the present case (*infra*, pp. 27-33), which demonstrate that there was an abuse of discretion calling for modification of the judgment. But we also submit that, because of the basis upon which the district court framed its judgment, the usual reasons for according great weight to the trial court's conclusions respecting relief are not applicable here. The district court believed that, upon grant of motion for summary judgment, relief must be confined to what the court regarded as the core of appellee's illegal conduct—price fixing by patent licenses (*infra*, pp. 29-32). Accordingly, apart from conduct of this precise form and character, the court made no discretionary determination as to the relief requisite to prevent appellees from further violating the Act and to undo the effects of their past illegal conduct.

I

Effective Relief Requires That Appellees Be Enjoined from Acting in Concert To Fix Prices in the Gypsum Board Industry and from Continuing, Pursuant to Such a Price-Fixing Agreement, Acts and Practices Used by Appellees as Means for Effectuating Price Control and Trade Regimentation

1. *The General Principles Applicable to Relief*

This Court has repeatedly declared the principles to be applied in determining relief in a suit

brought by the United States under Section 4 of the Sherman Act to "prevent and restrain" violations of the Act. The primary objective in such a case is to assure, so far as may be practicable, that the wrongdoers shall not again violate the statute. The acts proscribed by the judgment must be charted with sufficient definiteness to provide a true guide to future conduct. But the courts recognize that illegal restraints and monopolizations of trade may be achieved in many ways. The prohibitions of the judgment are therefore not to be confined to the precise conduct held to have been unlawful, and should embrace means used by the defendants in achieving their illegal ends.

In *Local 167 v. United States*, 291 U. S. 293, 299, the Court said:¹²

The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators.

Where a violation of the Sherman Act has been found, the court is "bound to frame its decree so as

¹² This Court has frequently referred with approval to the principles set forth in the *Local 167* case relative to relief. See *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461; *National Labor Relations Board v. Express Pub. Co.*, 312 U. S. 426, 437; *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 726; *Hartford-Empire Co. v. United States*, 323 U. S. 386, 409; *May Dept. Stores Co. v. National Labor Relations Board*, 326 U. S. 376, 391.

to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461. Likewise the court should suppress, in the absence of persuasive countervailing reasons, "the means by which the unlawful restraint was achieved" (*ibid.*). Merely to prohibit the precise scheme used by the defendants to effect an illegal restraint of trade is ineffectual to prevent future restraints and therefore insufficient. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 308. "The injunction should go further, and enjoin defendants from entering into or acting under any similar agreement in the future. In other words, the relief granted should be adequate to the occasion." (*Ibid.*). Accord, *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 727.

In the recent case of *International Salt Co. v. United States*, 332 U. S. 392, 400, the Court said:

When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention.

While a court may not "impose penalties in the guise of preventing future violations," this limitation does not mean that the judgment "need deal

only with the exact type of acts found to have been committed or that the Court should not, in framing its decree, resolve all doubts in favor of the Government, or may not prohibit acts which in another setting would be unobjectionable." *Hartford-Empire Co. v. United States*, 323 U. S. 386, 409.

A further aspect of relief, undoing the effects of the defendants' past misconduct, will be discussed in connection with the obligation to be imposed upon USG to grant licenses under its gypsum board patents. See *infra*, pp. 43-50.

2. *Inadequacy of the Injunctive Provisions of the District Court's Judgment*

Patently the district court's judgment does not conform to the accepted doctrines concerning relief to which we have referred. The injunctive provision (Art. V, R. 189) merely enjoins appellees from (1) carrying out their existing patent-license agreements, (2) agreeing to continue or revive "any monopolists practice," and (3) agreeing to restrain interstate commerce in the eastern United States in gypsum board (which by definition, Art. II, R. 187 means board made under certain USG patents), by license agreements to fix or stabilize prices of such board.

The first prohibition is an unimportant addendum to cancellation of appellees' existing license agreements. The second is ineffective as a deterrent. It is couched in such general terms that con-

tempt proceedings would involve the extended proof and trial required to establish a substantive violation of the Sherman Act. In *United States v. Crescent Amusement Co.*, 323 U. S. 173, 186, this Court gave as a reason for rejecting a provision of the judgment entered by the district court: "The generality of this provision of the decree bids fair to call for a retrial of a Sherman Act case any time a citation for contempt is issued." Cf. *International Salt Co. v. United States*, *supra*, at p. 400.

The third prohibition is plainly inadequate. Since it is limited to restraint of trade in the eastern United States in gypsum board which embodies an invention claimed in particular USG patents, it does not preclude price fixing through patent license agreements in gypsum board not embodying such an invention, or in gypsum board marketed in the western United States, or in other gypsum products made and sold by the appellees. But an even more serious deficiency is that the prohibition leaves appellees free to enter into price-fixing agreements of any kind or variety provided that patent licenses are not the medium for price fixing, and even leaves appellee free to employ the specific practices by which they have implemented price control and trade regimentation. Thus the judgment interposes no bar to the concerted adoption and enforcement of a host of rules designed to restrain price competition and stabilize prices, by action similar

to that condemned after lengthy proceedings in *Sugar Institute, Inc. v. United States*, 297 U. S. 553. Nor would the judgment prohibit concerted adherence to and policing of a delivered price basing point system, such as was held illegal after protracted proceedings in *Federal Trade Commission v. Cement Institute, Inc.*, 333 U. S. 683. Appellees have been found by this Court to have engaged in both of these types of practices, and appellees, in opposing summary judgment, have not controverted the Court's findings with respect to these practices (*infra*, pp. 40-43).

The district court did not state the reasons which led it to adopt injunctive provisions of such narrow scope. But observations made by individual members of the court ¹³ and its adoption of a judgment generally conforming to that proposed by the present appellees (*supra*, p. 9) make it evident that the court believed that, on grant of summary judgment, relief should be confined to the precise medium used by appellees in fixing prices and regimenting trade, namely, common acceptance of licenses (under USG gypsum board patents) containing price-fixing provisions.

In the court below appellees, in urging that the relief granted must be thus narrowly circumscribed, contended that price fixing through patent licenses was the single basis for summary judgment, and that the factual premises for any broader relief

¹³ R. 103, 111, 113, 119-120, 141.

were put in issue by their proffer of proof and must therefore be regarded as not proved for the purposes of summary judgment.

We submit that this contention is unsound both in fact and in law. Appellees' basic offense was concert of action in fixing prices and in regimenting trade in the gypsum board industry. Under the patent license agreements USG acted as the common delegatee of the other defendants. The specific acts and practices which the appellees employed to implement price fixing and regimentation of distribution were established by documentary evidence adduced at the original trial. As we show later (*infra*, pp. 40-43), that proof stands unchallenged insofar as the broader injunctive relief which the Government seeks may require factual support additional to that furnished by proof of concert of action in fixing prices and regulating distribution on an industry-wide scale. Appellees' proffer did not question any of the Government's documentary proof, did not impeach the testimony of any of its witnesses, and did not controvert those acts and practices of the appellees which are relevant to the relief provided in the judgment proposed by the Government.

Furthermore, the proffer of proof does not qualify the force of the Government's original evidence because the proffer was not supported by affidavits.¹⁴ Rule 56(c) of the Federal Rules of

¹⁴ In the district court the government urged that the proffer, in the absence of affidavit, raised no issue of fact (R. 89).

Civil Procedure provides that when a motion for summary judgment is filed the adverse party may serve opposing affidavits and that the judgment sought shall be rendered if the pleadings, depositions, and admissions on file "together with the affidavits, if any," show that there is no genuine issue as to any fact material to the judgment sought by the moving party. The importance of this requirement that the opposing party furnish affidavit support for the factual issues which it raises is emphasized by Rule 56(e), which provides that supporting and opposing affidavits shall be made "on personal knowledge," shall set forth facts which would be admissible in evidence, and shall show affirmatively that "the affiant is competent to testify to the matters stated therein." The importance of the requirement is further indicated by Rule 56(f) providing that the court may refuse the application for judgment should it appear from the "affidavits" of the opposing party that he cannot for reasons stated present "by affidavit" the facts essential to justify his opposition.

But in any event appellees' contention is unsound in law. Once the basic price-fixing conspiracy was proved, the relief to which the Government was entitled was not limited to an injunction against repetition of the precise details of the violation found. As the cases discussed (*supra*, pp. 25-27) hold, the judgment in a civil Sherman Act case should bar the defendants from using related or

similar means for achieving the unlawful ends which the court has found and adjudged—in this case, concerted fixing of prices and regulation of distribution in the gypsum industry.

The usual principles governing relief apply to a case decided on motion for summary judgment. *International Salt Co. v. United States*, 332 U. S. 392. The Court there held that when summary judgment is entered against the defendants in a proceeding under the Sherman Act, the usual rule prevails that the judgment should be so framed that it will bar further violation of the statute not only by the means found to have been employed but also by “untraveled roads” to the same end.

Consideration of the facts presently involved confirms the force and application of the holding in *International Salt*. Through common agreements with USG, appellees have fixed gypsum board prices and terms of sale in minute detail, and in pursuit of these ends they have concertedly engaged in many collateral activities. They have zealously and rigorously suppressed price competition in an entire industry. Accordingly the judgment entered against them should be sufficiently comprehensive to provide reasonable assurance that proven violators of the statute will not again transgress.

The fact, if we assume it to be a fact, that appellees believed that their acts were within the shelter of rights given by patent law is not a ground for

narrow and restricted prohibitions. Certainly appellees pushed their claims of patent privilege to extreme, if not reckless, lengths. They are not to be penalized because of their mistaken belief in the scope of their patent privileges, but on the other hand this belief is not ground for favored treatment. But the important point is that the prohibitions to which they should be subjected must be directed toward securing compliance with the law which appellees did violate.

3. *Adequate Relief Requires Injunctive Provisions of the Scope Proposed by the Government*

The judgment which the Government proposes would enjoin the defendant companies from making or carrying out any agreement or understanding to fix, maintain or stabilize the prices or terms or conditions of sale of gypsum products by means of patent licenses or other concerted action, and from continuing, pursuant to such an agreement or understanding, certain acts or practices which the appellees have employed in effectuating price control and trade regimentation (Appendix, *infra*, pp. 69-70).

Enjoining Price Fixing. In view of the earlier discussion of the principles governing relief and in view of what we have said about opportunities for further violation of the Act which are left open by the judgment entered in the court below, we believe it unnecessary to elaborate the reasons in

support of enjoining appellees from fixing prices by concert of action. Such concert of action is the epitome of appellees' offense, as adjudicated by the district court by Article III of its judgment and by this Court by affirming that article. Obviously the judgment should proscribe action of this kind, and not merely prohibit price fixing through patent licenses—the particular instrumentality utilized to achieve that end.

This view as to relief is implicit in the injunction *pendente lite* issued by this Court on May 29, 1950 (338 U. S. 960). The defendant companies were thereby enjoined from “entering into * * * any agreement * * * in restraint of trade * * * in gypsum board among the several states * * * by license agreements to fix, maintain or stabilize prices * * * or by license *or other concerted action* arranging the terms and conditions of sale thereof.” [Italics supplied.]

We comment on two subsidiary aspects of our proposed general injunctive provision against price fixing, its geographical scope and the products to which it applies.

While the Government's complaint charged violation of the Sherman Act with respect to interstate commerce among the states east of the Rocky Mountains (R. 3, 9-10) and while we concede that the district court's adjudication of violation of the Act in Article III of its judgment is properly limited to commerce in this area, we submit that

the injunction against price fixing should apply to interstate commerce generally. The situation might be different if any real significance attached to the geographical scope of the trade restraints charged and found. But here geographical scope signifies merely that, the so-called eastern territory (comprising most of the United States) was appellees' principal marketing area at the time the complaint was filed and that at that time no Pacific Coast producer was a licensee of USG. *Non constat* that the Pacific Coast will not later become an important sales outlet for appellees or that Pacific Coast manufacturers will not become USG licensees. It would be an absurd situation, we submit, if the injunction left appellees free to enter into a network of price-fixing patent licenses with respect to sales in the Pacific Coast area.

The other possibly controversial aspect of the Government's proposed injunction against price fixing is that it applies to gypsum products as defined in the proposed judgment¹⁵ rather than merely to gypsum board. Appellees fixed prices on the various kinds of gypsum board, but unpat-

¹⁵ The proposed judgment (Art. II, par. 4) defines "gypsum products" as meaning gypsum board as defined in the judgment, and plaster, block, tile, and Keene's cement made from gypsum (Appendix, *infra*, p. 66).

¹⁶ Appellees were making and fixing prices on the various kinds of gypsum board included within the definition. See price bulletin of April 1, 1938, set forth in Ex. No. 7 attached to Government's complaint (R. 94). They made and sold the other gypsum products included within our definition. See appellees' brief on the prior appeal (p. 5).

ented gypsum products, particularly gypsum plaster, were also within the orbit of their price-fixing activities. On the prior appeal this Court said (333 U. S. at p. 386):

Board and plaster were usually sold together and the defendants claim that cutting of prices on plaster, in sales of the two together, operated in effect as a rebate on the price of board, and hence was legally subject to control. The government introduced in evidence a large number of complaints to Board Survey by licensees as to their competitors' failure to maintain prevailing prices on plaster. A bulletin provision forbidding rebates and allowances stated that a sale of board at posted prices would be in violation of the license if the licensee reduced the price of other products, and Board Survey in summarizing violations of bulletin terms revealed through audit of the licensees' books listed "Price concessions on other material in connection with Board Sales."

Appellees' proffer of proof (R. 145-160) denied none of the facts thus stated. It therefore stands uncontroverted that appellees have taken, under claim of right, concerted action directly tending to stabilize prices of unpatented gypsum products. These facts furnish ample basis for including such products in the prohibition against price-fixing agreements.¹⁶

¹⁶ "The bulletin provision and complaints by licensees addressed to Board Survey convince us that the defendants

Local 167 v. United States, 291 U. S. 293 is direct authority for the proposition that injunctive relief need not be limited to the precise commodities as to which coercion has been practiced. The appellants there sought elimination of a provision of the district court's judgment which prohibited them from coercing marketmen "to buy poultry, poultry feed, or other commodities necessary to the poultry business" from particular sellers. The fact that the defendants had coerced marketmen to buy coops from a particular company was held to be adequate warrant for the foregoing prohibition. This Court said (p. 299):

The lack of specific evidence that coercion has been practiced or is threatened in respect of every detail or commodity ~~is~~ no adequate ground for striking out the clause or for limiting it to a mere specification of the coops. Having been shown guilty of coercion in respect of the coops in which poultry is kept and fed, appellants may not complain if the injunction binds generally as to related commodities including feed and the like. When regard is had to the evidence disclosing the numerous purposes of the conspiracy and the acts of coercion customarily employed by defendants, it is plain that the clause referred to cannot be condemned as unnecessary or without warrant.

attempted to stabilize plaster prices, and the fact that plaster prices were stabilized only when plaster was sold in conjunction with board appears to us to be immaterial." 333 U. S. at p. 399.

In *United States v. Crescent Amusement Co.*, 323 U. S. 173, 187-188, this Court sustained, over defendants' objection, an injunction which prohibited them from making film-licensing franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them, and from entering into "any similar combinations and conspiracies having similar purposes and objects." The present appellees, having at least engaged in a combination to fix or stabilize gypsum board prices, may be enjoined from engaging in a "similar" combination having "similar purposes," i.e., to fix ^{ON} stabilize prices of other gypsum products.

Enjoining Specific Practices. The judgment which we propose would enjoin certain specified practices when engaged in "pursuant to" a price-fixing agreement (Appendix, *infra*, pp. 69-70). Accordingly, these prohibitions, like those of the order of the Federal Trade Commission approved in *Federal Trade Commission v. Cement Institute, Inc.*, 333 U. S. 683, apply only to concerted activities.¹⁷

The practices proposed to be prohibited have

¹⁷ In the *Cement Institute* case the prohibiting paragraphs of the Commission's order were preceded by a preamble which directed the respondents to cease and desist from participating in any planned common course of action, agreement or understanding "to do or perform any of the following things." 333 U. S. at p. 728.

been used as means for carrying into effect a tight and monopolistic control over prices in the gypsum board industry (*infra*, pp. 40-43). It is established that where violation of the statute is found in a suit by the Government to "prevent and restrain" violations of the Sherman Act, the judgment should prohibit practices employed in effectuating the defendants' restraint or monopolization of trade. This view is so generally accepted that we deem it sufficient to refer, by way of illustration, to the provisions of the judgment which were affirmed in *Sugar Institute, Inc. v. United States*, 297 U. S. 553. In that case defendants' dominant purposes were to create and maintain a uniform price structure, to keep refined sugar prices relatively high as compared with raw sugar prices, to limit or suppress various contract terms and conditions, and to make as certain as possible that no secret price concessions should be granted. 297 U. S. 553, at p. 577. The district court's judgment included "forty-five specifications of prohibited action," and of the 45 this Court set aside only three (*id.*, 602-603). The practices prohibited by the judgment included regulating the conduct of brokers and warehousemen; preventing freight absorptions; agreeing to sell only at delivered prices; limiting the number of consignment points; restricting or prohibiting long-term contracts, quantity discounts, "tolling," and private brands; collecting and disseminating

statistical information not made available to others (*id.*, 586-597).¹⁸

The practices covered by the six subparagraphs of Article V of our proposed judgment have been concertedly used by appellees as an adjunct to and in support of price control and regimentation of trade.

Subparagraphs 1 and 2 deal with the same problem. The former would enjoin appellees from making uniform the kinds of gypsum products manufactured or sold or the method of manufacturing, selling, packaging, shipping, delivering or distributing such products. The latter would enjoin appellees from achieving the same end by negative action, that is, by refraining from the manufacture or sale of any type or variety of gypsum products or the method of manufacturing, selling, packaging, etc., such products.

It stands admitted that appellees engaged in practices of this nature. Their proffer of proof did not deny the following facts stated by this Court on the prior appeal as to requirements of the price bulletins issued by USG (333 U. S. 364, at pp. 382-383):

The freight was to be computed on specified uniform billing weights, in order to prevent variations in freight arising from the differ-

¹⁸ It was held in *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461, that the judgment "properly suppressed the means by which the unlawful restraint was achieved" even though such means "had been or might continue to be used for some lawful purposes."

ences in weight of board made by different manufacturers, and each licensee was directed to charge exactly the same switching, cartage, and extra delivery charges. Specified board sizes and minimum quantities were prescribed, * * * regulations were prescribed as to the size, quantity and markings of gypsum board used for packing shipments, granting of long-term credit was prohibited, sales on consignment were enjoined and licensees were forbidden to deliver board directly to a building site.

Most of these facts were also conceded by appellees in their brief on the prior appeal (pp. 18-19).

Subparagraphs 3 and 4 likewise deal with a common problem. The former prohibits agreeing upon any basis for selecting or classifying purchasers and the latter prohibits refraining from selling to any purchaser or class of purchasers. Such practices have been pursued in furtherance of appellees' schemes to regiment the industry. On the prior appeal this Court said that USG in 1930 had ordered elimination of the jobbers' discount and that, in consequence, those whom the license agreements defined as jobbers "were eliminated" (*id.*, p. 385).¹⁹ The Court also said since the appellees

¹⁹ "Jobbers" were defined in the license agreements as "those who do not manufacture but buy and sell plasterboard or gypsum wall board in straight cars or in mixed cars with other building material and who do not sell at retail" (R. 78).

Since jobbers buy for purposes of resale, elimination of their discount would obviously put them out of business. When all others can purchase at a price as low as that at which they purchase, there is no profit margin to cover the expense of carrying on their business.

were parties to a "common scheme to stabilize the industry," and since jobbers were eliminated in furtherance of that scheme, it was unnecessary to consider or determine the specific intent of each licensee in this connection (*id.*, pp. 397-398).

Appellees' proffer of proof does not deny that the license agreements clothed USG with power to take action binding upon all of its licensees or that USG, in exercise of this power, eliminated the jobbers' discount and thereby brought about the elimination of jobbers.²⁰

Subparagraph 5 would prohibit appellees from agreeing upon or adhering to any basing point delivered price system. This prohibition is directed against a course of action which the appellees concededly adopted and followed. Their proffer of proof does not deny the following facts stated by this Court on the prior appeal (*id.*, p. 382):

The bulletins adopted a basing point system of pricing, according to which each licensee was required to quote a price determined by taking the mill price at the nearest basing point and adding the all rail freight from the basing point to the destination.

Subparagraph 6 would prohibit appellees from policing, investigating or checking the prices or the terms or conditions of sale of gypsum products.

²⁰ Compare paragraphs 56 and 57 of appellees' proffer (R. 158-159).

Their proffered proof did not deny the following facts found to be shown by the evidence when the case was here before (*id.*, p. 384):

In order to insure compliance with the price bulletins, United States Gypsum established a wholly owned subsidiary in 1932 named Board Survey, Inc. Licensees were invited to send in complaints as to violations of pricing bulletins to Board Survey and that organization forwarded the complaints to the alleged delinquent licensees. Board Survey was authorized to make a thorough check-up of all reported violations and to take such action as it might deem necessary or proper to protect United States Gypsum's rights under the license agreements and patents. * * * Meetings of licensees were held at which doubtful provisions of the price bulletins were explained.

II

Effective Relief Requires Compulsory Licensing of USG's Gypsum Board Patents at Reasonable Royalty Rates and Other Terms Fair to Its Licensees

The basic requirement of Article VI of the judgment proposed by the Government is that USG grant to any applicant a non-exclusive license at a reasonable non-discriminatory rate of royalty under any or all of USG's present and future gypsum board patents²¹ (Appendix, *infra*, p. 70).

²¹ The article provides, however, that after five years from the judgment's effective date USG may apply to the district court for an order excluding from the obligation to license all patents which it acquires subsequent to such application. See Art. VI, par. 6, Appendix, *infra*, p. 72.

We submit that such relief is required by principles which have long been accepted.

As early as 1911 this Court held that where, as in this case, unlawful monopolistic power had been acquired and had been exercised for a period of many years, the duty of the courts to enforce the statute requires "the application of broader and more controlling remedies" than merely to forbid "the doing in the future of acts like those * * * done in the past." *Standard Oil Co. v. United States*, 221 U. S. 1, 77-78. In that situation it becomes essential also to exert "such measure of relief as will effectually * * * neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about." (*Ibid.*).

"Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." *United States v. Crescent Amusement Co.*, 323 U. S. 173, 189. If the judgment merely forbade a repetition of the illegal conduct, those who had violated the Act "could retain the full dividends of their monopolistic practices." *Schine Theatres v. United States*, 334 U. S. 110, 128. "Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project." (*Ibid.*). "A public interest served by"

civil suits by the Government to enforce the Act "is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co. v. United States*, 332 U. S. 392, 401. If the judgment which is entered "accomplishes less than that" it falls short of achieving the statutory objective (*ibid.*).

In cases such as the present where the defendants' violation of the statute has been grounded on misuse of patents, this Court has applied the foregoing principles by requiring the defendant patentee or patentees to license their patents to others upon terms reasonably safeguarding the interests of those licensed thereunder, including payment of a reasonable royalty for licensed patents. *Hartford-Empire Co. v. United States*, 323 U. S. 386; *United States v. National Lead Co.*, 332 U. S. 319. The former case upheld such compulsory licensing as to both presently-owned and subsequently-acquired patents,²² and the latter case upheld this requirement as to both the defendants' existing patents and those acquired by them within five years from the date of judgment.²³

In the circumstances of the instant case it is unnecessary for the Government to contend that when-

²² See paragraphs 24(a) and 24(b) of the district court's judgment as summarized by this Court and affirmed with modifications (323 U. S. at pp. 413, 417-418).

²³ See paragraph 7 of the district court's judgment read in conjunction with the definition of patents in paragraph 4 of the judgment (332 U. S. 319, note 4, at pp. 330, 332).

ever a defendant's violation of the Sherman Act has involved misuse of patents, compulsory patent licensing is a necessary element of relief. Here the need for such a requirement is clear. USG is the dominant factor in the industry.²⁴ By means of patents which ostensibly controlled the technology of the industry, it has "maintained rigid control over the price and terms of sale of virtually all gypsum board" (333 U. S. at p. 371). If the judgment allows USG freedom to license or not to license its patents, USG will remain clothed with power to refuse licenses under its patents and to use the threat of costly patent litigation to exclude others from the industry.

These are consequences which the judgment should guard against even if they were regarded as mere potentialities. But they are much more than this. It has been USG's consistent policy to license its patents only if the licensee would accept a license giving USG the right to fix the licensees' sales prices.²⁵ This Court has recently pointed out that it need not be assumed "contrary to common

²⁴ In 1939, the year before the Government's complaint was filed, it sold 55% of all gypsum board in the eastern area. 333 U. S. at p. 368.

²⁵ Appellees' brief on the prior appeal to this Court stated (p. 90) that Avery, chairman of USG's board of directors, in negotiating settlement of patent litigation with Beaver Products Company (subsequently acquired by appellee Certain-teed Products Corp.) and the grant of a license to Beaver under USG's closed-edge patent, specified the terms of settlement, one of which was "the right in USG to fix the prices of gypsum board made by Beaver" under USG's patent. The brief then states: "From that time forward those were the same unyielding terms of Avery and USG for any and all of

experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do." *International Salt Co. v. United States*, 332 U. S. 392, 400.

Neither USG nor the court below has denied the need for compulsory license of some sort.²⁶ But the licensing required is insufficient to open up USG's gypsum board patents to newcomers. In the first place, the obligation to license is limited to nine patents (*supra*, p. 11), and of these nine patents, two have already expired, two more will expire by the end of 1950, one will expire early in 1951, and of the other four patents that with the longest life will expire on May 11, 1954.²⁷ In the

the companies in the industry. * * * If any company wanted a license on those terms it got one."

The substance of these statements is repeated in paragraph 12 of appellees' proffer of proof (R. 147-148).

²⁶ The form of judgment submitted by USG provided for licensing its co-defendants under the nine patents covered by the forms of license agreements which USG submitted to the court (R. 358).

²⁷ The following shows the expiration dates of the nine patents:

Patent Number	Expiration Date
1,890,418	December 6, 1949 (R. 185)
1,914,345 (R. 179)	June 12, 1950*
1,934,174	November 7, 1950 (R. 185)
1,938,354 (R. 171)	December 5, 1950*
1,946,056	February 6, 1951 (R. 176)
2,015,817	October 1, 1952 (R. 185)
2,017,022	October 8, 1952 (R. 165)
2,079,338	May 4, 1954 (R. 165)
2,080,009	May 11, 1954 (R. 165)

* The record does not show the expiration dates of Patent Nos. 1,914,345 and 1,938,354, but they in fact expire on the dates given above.

second place, the judgment requires licensing only if application therefor is made within 90 days from the judgment's effective date (R. 189). The 90-day time limitation makes compulsory licensing a practical nullity as far as any newcomer to the business is concerned, since the serious practical problems involved in embarking upon the manufacture of gypsum board can hardly be resolved within the brief period allowed by the judgment. In the third place, the judgment does not properly safeguard the rights of licensees with respect to the terms and conditions of the license, including the rate of royalty to be paid. See *infra*, pp. 51, 56.

Clearly more compelling reasons for compulsory licensing exist here than in the *National Lead* case *supra*. The basic violation there was a so-called "international cartel" which allocated world markets, barred foreign concerns from selling in this country, and barred the defendants from selling in foreign countries. The judgment provided effective relief against such restraints and monopolization when it struck down the cartel agreements and enjoined their continuation or renewal. Compulsory licensing constituted relief designed to prevent barriers to competition in the field of domestic production and commerce, and in this field the defendants' restraints were minor compared to those of the present appellees. The cross-licensing patent agreements entered into between National Lead and Du Pont did not contain price

restrictions, there was no allocation of territory or customers between them, they actively competed for customers, and although they sold for identical prices there was no evidence that such price identity was the product of agreement or collusion. See 332 U. S. at pp. 346-347.

Our proposed judgment, like the judgments approved in the *Hartford-Empire* and *National Lead* cases, provides for compulsory licensing of subsequently acquired patents.²⁸ This requirement is designed to prevent USG from using such patents to prevent competition from developing. But our proposed judgment, notwithstanding the broader scope of the judgment approved in *Hartford-Empire* (see *supra*, p. 45), does not contemplate that the obligation to license shall extend to pat-

²⁸ In most of the judgments entered by consent in Sherman Act cases in which compulsory licensing has been required the requirement has included patents acquired subsequent to the entry of judgment. *United States v. General Electric Co.* (D. N.J., 1946), CCH Trade Reg. Serv. ¶ 57448; *United States v. Diamond Match Co.* (S.D.N.Y., 1946), *id.* ¶ 57456; *United States v. Technicolor, Inc.* (S.D. Calif., 1950), *id.* ¶ 62586; *United States v. American Can Co.* (N.D. Calif., 1950), *id.* ¶ 62679; *United States v. Continental Can Co.* (N.D. Calif., 1950), *id.* ¶ 62680; *United States v. General Cable Corp.* (S.D.N.Y., 1948), *id.* ¶ 62300; *United States v. Libbey-Owens Ford Glass Co.* (N.D. Ohio, 1948), *id.* ¶ 62323; *United States v. Technicolor, Inc.* (S.D. Calif., 1948), *id.* ¶ 62338; *United States v. Owens-Corning Fiberglass Corp.* (N.D. Ohio, 1949), *id.* ¶ 62442; *United States v. Automatic Sprinkler Co.* (N.D. Ill., 1948), *id.* ¶ 62230; *United States v. Gamewell Co.* (D. Mass., 1948), *id.* ¶ 62236; *United States v. American Optical Co.* (S.D.N.Y., 1948), *id.* ¶ 62308; *United States v. Phillips Screw Co.* (N.D. Ill., 1949), *id.* ¶ 62394; *United States v. Bendix Aviation Corp.* (S.D.N.Y., 1948), *id.* ¶ 62349.

ents acquired by USG from now to the end of time. Paragraph 6 of proposed Article VI (*infra*, p. 72) provides that at any time after five years from the judgment's effective date USG may apply to the district court to have the judgment modified so as to exclude from the obligation to license all patents which USG acquires after the date of such application.²⁹ Paragraph 6 further provides that the court shall grant the application upon a showing by USG that the effects of appellees' illegal combination have been dissipated and that competitive conditions in the gypsum board industry have been restored.

The detailed provisions of our proposed Article VI are not, we believe, seriously controversial, but we will set forth and explain the reasons for its most important provisions.

(1) It provides (par. 3) that the court shall determine what is a "reasonable" royalty if the parties fail to agree thereon. Such a provision is an inherent element of a requirement to license at a reasonable royalty. The judgment approved by this Court in the *National Lead* case contained a provision of this kind,³⁰ and the district court in the *Hartford-Empire* case, following remand to it,

²⁹ The right thus conferred is supplementary to the general right to apply for modification of the judgment granted by Article X of our proposed judgment (*infra*, p. 75).

³⁰ Paragraph 7 of the judgment in that case provided: "The Court reserves jurisdiction to pass upon the reasonableness of any royalty or charge herein directed to be reasonable." 332 U.S. 319, note 4, at p. 332.

undertook determination of the reasonable royalty if the parties could not come to an agreement.³¹

In contrast with this provision, the district court's judgment provides (Art. VI, R. 190) that the license agreement which USG is required to tender shall fix a royalty "not to exceed the royalty of the same article or process fixed in the license agreements set out in Article I' hereof," i.e., in the license agreements adjudged unlawful by Article IV of the judgment. Moreover, since Article VIII of the court's judgment (R. 190) provides that tender by USG of an agreement containing the provisions of the applicable form of agreement approved by the court shall constitute compliance by USG with the provisions of Article VI, and since each of the approved forms of agreement specifies the exact royalty to be paid (R. 166, 172, 176, 180), under the court's judgment the royalty rates fixed by the canceled license agreements are not only the maximum royalty rates payable by USG's licensees, but are the actual royalty rates payable by them. It follows that any one obtaining a patent license pursuant to the compulsory licensing provisions of the court's judgment is bound to pay the royalty rates agreed upon many years previously as an incident to price-fixing license agreements, and is precluded from showing that the doubtful validity of the licensed patent or

³¹ See *United States v. Hartford-Empire Co.*, 65 F. Supp. 271 (N.D. Ohio).

its relatively slight practical utility warrants a lower royalty rate.

(2) It provides (par. 4) that where the court has been called upon to determine the reasonable royalty, USG may ask to have an interim royalty rate fixed. This serves to protect USG in the event of substantial delay in determining the reasonable royalty.

(3) It provides (par. 2, cl. (b)) that the reasonable royalty which the licensee is to pay to USG "may not be imposed upon or measured by patent-free products, processes or uses." This provision draws support from the circumstances and conditions under which the appellees have concertedly restrained trade. USG's license agreements with its codefendants provided for payment of royalty on "all board sold, patented or unpatented, a provision which would tend to discourage the production of higher cost unpatented board" (333 U. S. at p. 385). On the prior appeal this Court said that the provision for payment of royalties on unpatented board "is strongly indicative of an agreement not to manufacture unpatented board, and the testimony of the witnesses is ample to show an understanding, if not a formal agreement that only patented board would be sold. Such an arrangement in purpose and effect increased the area of the patent monopoly and is invalid." 333 U. S. at p. 397.

Irrespective of whether or not the Court's statement as to agreement or understanding is binding upon the appellees in the present posture of the case, facts which are undisputed support the proposed bar against including unpatented products in the measure of royalty payments. Admittedly, the license agreements through which appellees controlled prices and regimented trade did provide for payment of royalties on unpatented board. It is likewise beyond dispute that, as declared by this Court, such a provision lends itself to price control over patented board. These circumstances are sufficient to warrant the prohibition under consideration, in order to guard against the danger that license provisions making sales of unpatented products a measure of the royalty will again be put to an improper use.

Automatic Radio Co. v. Hazeltine, 339 U. S. 827, 832-833, does not require a contrary conclusion. That case merely held that a provision in a patent licensing agreement that royalty be measured by the licensee's sales of certain goods, whether patented or unpatented, does not in itself create a restraint or monopoly such as to constitute a misuse of patents outside the scope of the patent grant. The case therefore did not involve any question as to the relief appropriate when violation of the anti-trust laws has been found.

(4) Proposed Article VI provides (par. 3) that, where the court is called upon to determine the

reasonable royalty, the burden of proof shall be on USG to establish the reasonableness of the royalty which it requests. We submit that this is a reasonable requirement. The facts bearing upon the value of the patented invention are known to USG but are largely unknown to applicants for licenses. There is, moreover, ample precedent for the provision under consideration. *United States v. Line Material Co.*, 333 U.S. 287, involved, like the present case, price fixing pursuant to patent licenses. After this Court reversed the district court's judgment of dismissal, the final judgment which was entered provided for compulsory licensing at a reasonable royalty and had the same provision as to burden of proof as that which we here propose.³² It also appears in some three-fourths of the recently entered Sherman Act consent decrees which provide for compulsory licensing at a reasonable royalty.³³

³² See Article V, paragraph E, of judgment in *Line Material* case, Appendix B, *infra*, p. 757. The burden-of-proof provision is also included in the judgment entered in another litigated case, *United States v. American Can Co.* (N.D. Calif., 1950), CCH Trade Reg. Serv. ¶ 62679.

³³ *United States v. American Lecithin Co.* (N.D. Ohio, 1946), CCH Trade Reg. Serv. ¶ 57542; *United States v. American Locomotive Co.* (N.D. Ind., 1947), *id.* ¶ 57621; *United States v. Electric Storage Battery Co.* (S.D.N.Y., 1947), *id.* ¶ 57645; *United States v. Standard Register Co.* (D. D.C., 1949), *id.* ¶ 62533; *United States v. Technicolor, Inc.*, *supra*, ¶ 62586; *United States v. General Cable Corp.*, *supra*; *United States v. Libbey-Owens Ford Glass Co.*, *supra*; *United States v. Technicolor, Inc.*, *supra*, ¶ 62338; *United States v. Owens-Corning Fiberglass Corp.*, *supra*; *United States v. Automatic Sprinkler Co.*, *supra*; *United States v. Gamevell Co.*, *supra*; *United States v. White Cap Co.*, (N.D. Ill., 1948), CCH Trade

(5) The proposed article provides (par. 2, cl. (c)) that any license granted by USG pursuant to its provisions may make reasonable provision for periodic inspection of the licensee's books and records by an independent auditor or other person acceptable to the licensee, "who shall report to the licensor only the amount of the royalty due and payable." This provision for an independent audit furnishes assurance that USG will receive the full amount of royalties payable under the license. The words quoted above are contained in the judgment entered in the *National Lead and Line Material* cases³⁴ and the same provision is contained in almost all of the recent Sherman Act consent decrees which provide for compulsory licensing at a reasonable royalty.³⁵

Reg. Serv. ¶ 62268; *United States v. American Optical Co.*, supra; *United States v. Phillips Screw Co.*, supra; *United States v. Bendix Aviation Corp.*, supra, ¶ 62349.

³⁴ 332 U. S. 319, 332; Art. V, par. D, cl. (3), of the judgment, *infra*, p. 76.

³⁵ *United States v. Bendix Aviation Corp.* (D. N.J., 1946), CCH/Trade Reg. Serv. ¶ 57444; *United States v. American Air Filter Co.* (W.D. Ky., 1946), *id.* ¶ 57492; *United States v. American Lecithin Co.*, supra; *United States v. Timken Detroit Axle Co.* (E.D. Mich., 1947), *id.* ¶ 57603; *United States v. American Locomotive Co.*, supra; *United States v. Electric Storage Battery Co.*, supra; *United States v. Standard Register Co.*, supra; *United States v. Technicolor, Inc.*, supra, ¶ 62586; *United States v. General Cable Corp.*, supra; *United States v. Libbey-Owens Ford Glass Co.*, supra; *United States v. Technicolor, Inc.*, supra, ¶ 62338; *United States v. Owens-Corning Fiberglass Corp.*, supra; *United States v. Automatic Sprinkler Co.*, supra; *United States v. Gamewell Co.*, supra; *United States v. White Cap Co.*, supra; *United States v. American Optical Co.*, supra; *United States v. American Bosch Corp.* (S.D.N.Y., 1948), *id.* ¶ 62284; *United States v. Phillips Screw Co.*, supra; *United States v. Scopony Corp. of America* (S.D. N.Y., 1949), *id.* ¶ 62356; *United States v. Bendix Aviation Corp.*, supra, ¶ 62349.

The need for the limitations of our proposed clause (c) of paragraph 2 becomes apparent when consideration is given to the nature and effect of the provisions of the district court's judgment relating to USG's policing of royalty payments. The judgment provides that USG may satisfy its requirements as to licensing by entering into license agreements in the form of those "hereby approved" by the court (*supra*, p. 11). Of the forms of agreement which the court approved, the form applicable to the most important patents which USG is required to license provides that the licensee shall make monthly reports setting forth the quantity of all board manufactured by it under the licensed patents, "together with the selling price thereof" (R. 166-167). It further provides that USG may inspect the books and records of the licensees bearing upon the information required to be reported and "make copies thereof and memoranda therefrom," subject to the proviso that, upon the licensee's written request, such "examination" shall be made by a certified public accountant agreed upon between the parties (R. 167).³⁶ Under these provisions USG would have the competitive advantage of exact information as to its competitors' sales and prices. In addition, the report-

³⁶ There are comparable reporting and inspection provisions in the other approved forms of license agreement (*supra*, p. 11).

ing and inspection provisions would strongly militate against aggressive price competition or sales expansion by licensees.

(6) Paragraph 5 of proposed Article VI, which provides that the judgment shall not be construed as importing any validity or value to USG's patents or as preventing any applicant for a license from attacking the validity or scope of any such patent, is certainly unobjectionable.

III

Representatives of the Department of Justice Should Have the Right, under the Judgment, To Inspect Books and Records of the Corporate Defendants Relating to Matters Contained in the Judgment

Article VIII of our proposed judgment (*infra*, p. 73) provides that authorized representatives of the Department of Justice may, upon written request of the Attorney General or an Assistant Attorney General, examine the corporate defendants' books and records and interview their officers or employees with reference to matters contained in the judgment. It further provides that no information so obtained shall be disclosed except in proceedings by the United States to enforce the judgment or as otherwise provided by law. The article is almost identical with a paragraph of the judgment which was reviewed and affirmed in *United States v. Bausch & Lomb Co.*, 321 U. S. 707,

718, 724-728.³⁷ *Hartford-Empire Co. v. United States*, 323 U. S. 386, 433, upheld a similar paragraph of the judgment entered in that case.³⁸

In four subsequent appeals to this Court the judgments from which the respective defendants appealed contained the visitation provision embodied in our proposed Article VIII. *United States v. Pullman Co.*, 330 U. S. 806;³⁹ *United States v. National Lead Co.*, 332 U. S. 319;⁴⁰ *United States v. Paramount Pictures, Inc.*, 334 U. S. 131;⁴¹ *Standard Oil (Calif.) v. United States*, 337 U. S. 293.⁴² In two of the cases (*Pullman* and *Standard Oil*) this provision of the judgment was not assigned as error. In each of the other two cases one of the appealing defendants assigned it as error but did not press the assignment in its brief on appeal.⁴³ The final judgment entered in the *Line*

³⁷ The article does not contain a provision of the *Bausch & Lomb* judgment which this Court disapproved (p. 728), namely, that the defendants, on the Attorney General's request, shall submit reports with respect to matters contained in the judgment.

³⁸ The Court, in upholding the paragraph, directed that it be modified to accord with the Court's opinion in the *Bausch & Lomb* case. See preceding note.

³⁹ Par. 32 of judgment (Nos. 253-256, Oct. Term, 1946, Record 772).

⁴⁰ Par. 10 of judgment (333 U.S. 319, note 4, at pp. 333-334).

⁴¹ Part VI of judgment (Nos. 79-86, Oct. Term, 1947, Record 3700).

⁴² Par. XII of judgment (No. 279, Oct. Term, 1948, Record 192).

⁴³ As to *National Lead* case, see No. 91, Oct. Term, 1946, Record 346; appellants' brief 48. As to the *Paramount* case, see No. 83, Oct. Term, 1947. R. 3785; appellants' brief 9-48.

Material case following this Court's decision in 333 U. S. 287 likewise contains the visitation provision now under consideration (Appendix B, *infra*, p. 78), and the judgment entered by the district court following its decision in *United States v. American Can Co.*, 87 F. Supp. 18 (N. D. Calif.), includes this provision.⁴⁴ Furthermore, the visitation provision is found in practically all Sherman Act consent judgments which provide for compulsory licensing at a reasonable royalty. See judgments cited in notes 28, 33, 35, *supra*, pp. ⁴⁹54, 55.

It thus appears that both the courts and litigants have widely recognized that a provision of the kind here proposed reasonably serves to facilitate enforcement of a judgment which may require further action by the court in carrying out its provisions, and to prevent evasion of the obligations imposed by the judgment. Our proposed Article VIII has the support of consistent precedent and authority, and it does not infringe any substantive right of the appellees. We submit that it should be incorporated in the judgment entered in this case.

⁴⁴ CCH Trade Reg. Ser. ¶ 62,679. The defendant did not appeal from this judgment, which was entered on June 22, 1950.

There is also a visitation provision in the judgment entered by stipulation in the companion case, *United States v. Continental Can Co.*, CCH Trade Reg. Ser. ¶ 62680.

IV

The Adjudication of Defendants' Violation of the Sherman Act Should Include the Individual Defendants

The Government is not asking to have the injunctive provisions of the judgment run against the individual defendants. Under Article V of the district court's judgment (R. 189) and of the judgment we propose (*infra*, p. 68) the defendant companies and their respective officers, directors, agents, etc., are enjoined from doing certain things. The individual defendants are thereby bound as long as they remain officers or agents of the defendant companies. Under the circumstances of this case, we do not urge that the judgment restrain the action or conduct of the individual defendants *qua* individuals. Cf. *Hartford-Empire Co. v. United States*, 323 U. S. 386, 433-435.

But exclusion of the individual defendants from the adjudication of violation of the Sherman Act made in Article III of the district court's judgment (R. 189) presents a different question. Appellee Sewell L. Avery was admittedly the principal architect of the concerted price fixing and other restraints which have been adjudged illegal both by this Court and by the district court. It is therefore clear that the adjudication of violation of the Sherman Act should embrace this defendant as well as the other individual defendants who helped to formulate and carry out the unlawful scheme con-

demned by the judgment. To accomplish this result, we propose that Article III of the judgment name the "defendants" rather than the "defendant companies" as violators of the Sherman Act. We do not construe the *per curiam* order of this Court affirming Article III (339 U. S. 960) as closing the door to expansion of the coverage of this article.

Of the individual defendants named in the complaint, Bror H. Dahlberg is no longer a defendant and the adjudication which we request would not apply to him.⁴⁵ Since the Government has some doubt as to the sufficiency of the evidence as to defendant Henry J. Hartley, it will, on remand of the case to the district court, dismiss the complaint as to this defendant prior to the entry of judgment. Accordingly, the individual defendants who would be covered by our proposed Article III would be Sewell L. Avery, Oliver M. Knode, Melvin H. Baker, Frederick G. Ebsary and Frederick Tomkins. Each of them has been a party to one or more of the license agreements which were the heart of appellees' illegal combination and concert of action.⁴⁶

We believe our proposed change in Article III to be of substantial importance because the judg-

⁴⁵ The Government at the close of its evidence dismissed the complaint as to this defendant. He was not named as an appellee either in the Government's prior appeal (R. 4189) or in the present appeal (R. 196).

⁴⁶ For typical license agreements executed by one or more of the above individual defendants, see Gov. Exs. 5 (R. 4267-4276), 8 (R. 4337-4350), 9 (R. 4355-4374), 16 (R. 4495-4497).

ment, if left unchanged, would stand as a precedent for the proposition that when corporate officers have been parties to a violation of the Sherman Act, the guilt of the corporations on whose behalf the officers acted somehow insulates them from the prohibitions of the Act.

V

The Judgment Should Require Appellees To Pay the Taxable Costs of the Proceeding

The district court's judgment (Art. X) requires appellees to pay 50% of the costs of the proceeding (R. 191), whereas our proposed judgment (Art. IX) would charge the full taxable costs against them (*infra*, p. 74). The doctrine which is implicit in the district court's ruling is that a violation of the Sherman Act resulting from a mistaken view as to the law's scope is not a full-fledged violation of the statute but a special category of violation meriting lenient and preferred treatment. Our primary concern is to obtain repudiation of this spurious doctrine.⁴⁷

Rule 54(d) of the Federal Rules of Civil Procedure provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." While the court is thus not required to award costs to the prevailing party, failure to do so in the absence of solid basis there-

⁴⁷ The costs for witness fees, mileage and subsistence amount to \$2,809.50.

for constitutes a reversible abuse of discretion. In *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1 (C. A. 7), where the plaintiff brought a triple-damage suit based upon the defendant's alleged violation of the Robinson-Patman Act, the district court held that the plaintiff had failed to establish violation of the statute, but nevertheless taxed one-half of certain costs of the proceeding to the defendant. The court of appeals, in reversing the latter ruling, said (p. 11):

As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty for some defection on his part in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or by delaying in raising objection fatal to the plaintiff's case. *Highway Const. Co. v. City of Miami*, 5 Cir., 126 F. 2d 777; *Royal Metal Mfg. Co. v. Art Metal Works*, 2 Cir., 130 F. 778; *Harland v. Bankers' & Merchants' Tel. Co.*, C. C., 32 F. 305; *In re Swartz*, 7 Cir., 130 F. 2d 229; *Commentary*, 5 F. R. S., 54d. 143.

It is a rare proceeding under the Sherman Act in which the defendants do not assert that they believed their conduct to be within the law. The fact, if we assume it to be a fact, that the present appellees entertained such a belief is no reason for departing from the usual rule as to taxation of costs. There has been no "defection" on the Gov-

ernment's part tending to increase the costs of the litigation. Nor are there any special equities warranting departure from the usual rule. The defendant companies (charged with payment of costs) are large and successful concerns. Presumably they have profited handsomely from their violation of the Act during a period of many years, under a system whereby the leading member of the industry "maintained rigid control of the price and terms of sale of virtually all gypsum board" (333 U. S. at p. 371).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, with directions to enter a judgment embodying the provisions of the proposed judgment set forth in the Appendix to this brief.

Respectfully submitted.

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SEPTEMBER 1950.

APPENDIX A

JUDGMENT PROPOSED TO BE ENTERED.

Article I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

Article II

For the purposes of this judgment:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. "Patents" shall mean United States Letters Patent and applications for United States Letters Patent relating to gypsum board, its processes, methods of manufacture, or use, and continuations in whole or in part, renewals, reissues, divisions, and extensions of any such patent or patent application.

3. "Gypsum board" shall mean plasterboard, lath, wallboard, special surfaced board, sheathing, liner board (including any such product which is perforated or metallized) made from gypsum.

4. "Gypsum products" shall mean gypsum board as defined in the preceding paragraph, and plaster, block, tile and Keene's cement made from gypsum.

5. As used in Article IV, "license agreements" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows:

Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;

Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsery Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee;

Agreement dated April 23, 1930, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Co., as Assignee), licensee;

Agreement dated February 10, 1937, between United States Gypsum Company, as licensor,

and Texas Cement Plaster Company, as licensee;

Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);

Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);

Agreement dated November 2, 1934, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Metallized board);

Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee (Metallized board);

Agreement dated August 14, 1935, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Metallized board);

Agreement dated June 8, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated February 2, 1937, between United States Gypsum Company, as licensor,

and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated June 23, 1937, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Perforated lath);

Agreement dated January 3, 1939, between United States Gypsum Company, as licensor, and Newark Plaster Company, as licensee (Perforated lath), and any supplement or amendment to any of said patent license agreements.

Article III

The defendants have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Antitrust Act.

Article IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the antitrust laws of the United States and illegal, null and void.

Article V

The defendant companies, and their respective officers, directors, agents, employees, representa-

tives, and subsidiaries, be and each of them hereby is enjoined from entering into or performing any agreement or understanding to fix, maintain, stabilize, or make uniform, by patent license agreements or by other concerted action, the prices, or the terms or conditions of sale of, gypsum products sold or offered for sale or resale in or affecting interstate commerce; and from engaging in, pursuant to such an agreement or understanding, any of the following acts or practices:

1. Fixing, maintaining or making uniform the kinds, types, or varieties of gypsum products manufactured or sold; or the methods of manufacturing, selling, packaging, shipping, delivering or distributing gypsum products;

2. Refraining from the manufacture, sale or distribution of any kind, type, or variety of gypsum products or the method of manufacturing, selling, packaging, shipping, delivering or distributing gypsum products;

3. Agreeing upon or adhering to any basis for the selection or classification of purchasers of gypsum products;

4. Refraining from selling gypsum products to any purchaser or any class of purchasers;

5. Agreeing upon or adhering to any system of selling or quoting gypsum products at prices calculated or determined pursuant to a basing point delivered price system or any other plan or system which results in identical prices or price quotations at given points of sale or quotation by defendants using such plan or system;

6. Policing, investigating, checking or inquiring into the prices, quantities, terms or conditions of any offer to sell or sale of gypsum products.

Article VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor a non-exclusive license to make, use and vend under any, some or all of the patents now or hereafter owned or controlled by it; and is hereby enjoined from making any sale or other disposition of any of said patents which deprives it of the power or authority to grant such licenses, unless it requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee shall observe the requirements of Articles VI and VIII of this judgment and unless the purchaser, transferee or assignee shall file with this Court, prior to consummation of said transaction, an undertaking to be bound by said articles of this judgment.

2. Defendant United States Gypsum Company is hereby enjoined from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this article except that (a) the license may be non-transferable; (b) a reasonable non-discriminatory royalty may be charged, which royalty may not be imposed upon or measured by patent-free products, processes or uses; (c) reasonable provisions may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee, who shall

report to the licensor only the amount of the royalty due and payable; (d) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalty or to permit the inspection of its books and records as hereinabove provided; (e) the license must provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving 30 days' notice in writing to the licensor.

3. Upon receipt of written request for a license under the provisions of this article, defendant United States Gypsum Company shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for a license was received by United States Gypsum Company, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and United States Gypsum Company shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General, who shall have the right to be heard thereon. In such proceeding, the burden of proof shall be on United States Gypsum Company to establish the reasonableness of the royalty requested by it, and the reasonable royalty rates, if any, determined by the Court shall apply to the applicant and all other licensees under the same patent or patents. Pending the completion of any such proceeding the applicant shall have the right to make, use and vend under the patents to which his application pertains without payment

of royalty or other compensation except as provided in paragraph 4 of this article.

4. Where an application has been made to this Court for the determination of a reasonable royalty under paragraph 3 of this article, United States Gypsum Company may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate, United States Gypsum Company shall then issue and the applicant shall accept a license, or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be grounds for the dismissal of his application. Where an interim license or sublicense has been issued pursuant to this paragraph, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and for all other licensees under the same patent or patents whose licenses provide for a higher royalty rate to a date to be fixed by the Court.

5. This judgment shall not be construed (a) as preventing any applicant from attacking, in this proceeding or in any other proceeding, the validity or scope of any patent of defendant United States Gypsum Company, or (b) as importing any validity or value to any such patent.

6. At any time after five years from the effective date of this judgment defendant United States Gypsum Company may apply to this Court, after

notice to the Attorney General, for an order limiting the application of paragraph 1 of this Article to patents coming under the ownership or control of the United States Gypsum Company prior to the date of such application; and the Court, upon a showing by United States Gypsum Company that the effects of defendants' combination have been dissipated and that competitive conditions in the gypsum board industry have been restored, shall grant said application and enter an order modifying paragraph 1 of Article VI of this judgment.

Article VII

Nothing contained in this judgment shall be deemed to have any effect upon the operations or activities of the defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this article shall in any manner affect the provisions of Article VI of this judgment.

Article VIII

For the purpose of securing compliance with this judgment, authorized representatives of the Department of Justice, upon written request of the Attorney General or an Assistant Attorney General to any defendant company and upon reasonable notice, shall be permitted, subject to any legally recognized privilege, access during the office hours of said defendant to all books, ledgers, ac-

counts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment. Any authorized representative of the Department of Justice shall be permitted to interview officers or employees of any defendant company regarding any such matters, subject to the reasonable convenience of said defendant but without restraint or interference from it; provided, however, that such officer or employee may have counsel present. No information obtained by the means provided in this article shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

Article IX

Judgment is entered against the defendant companies for all costs to be taxed in this proceeding, and the costs so to be taxed are hereby prorated against the several defendant companies as follows:

United States Gypsum Company...	55%
National Gypsum Company.....	23%
Certain-teed Products Corporation	11%
The Celotex Corporation.....	3%
Ebsary Gypsum Company, Inc.....	3%
Newark Plaster Company.....	4%
Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company	1%

Article X

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this judgment, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this judgment, and (2) for the enforcement of compliance therewith and the punishment of violations thereof,

APPENDIX B

PORTIONS OF FINAL JUDGMENT IN UNITED STATES
-V. LINE MATERIAL CO.

Article V

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C. Defendants Line Material Company and Southern States Equipment Corporation, their successors and assigns, are hereby ordered and directed with respect to the patents listed in said "Schedule A" and all patents on inventions made prior to March 24, 1944 pertaining to dropout fuse cutouts hereafter acquired by them, or either of them, during the life of Schultz et al. Patent Re. 22,412 and any reissue thereof, to grant to each applicant therefor a non-exclusive license to make, use, and vend dropout fuse cutouts and their parts under any, some, or all of said patents, or under any claim or claims thereof. Said defendants, their successors and assigns, are further ordered and directed with respect to all claims of Schultz

et al. Patent Re. 22,412, and with respect to all claims of Lemmon Patent No. 2,150,102, which read on a structure claimed by said Schultz et al., patent, to grant each applicant therefor a non-exclusive license to make, use, and vend under any claim or claims thereof. Each of said two defendants, its successors and assigns, are hereby enjoined and restrained from making any assignment, sale, or other disposition of any of said patents which would deprive it, or them, of the power or authority to grant such licenses, unless it is required, as a condition of such assignment, sale, or other disposition, that the purchaser, transferee, or assignee, shall observe the requirements of Articles V and VI of this judgment; and the purchaser, transferee, or assignee shall file with this Court, prior to consummation of said transaction a consent to be bound by the provisions of said Articles V and VI of this judgment.

D. Defendants Line Material Company and Southern States Equipment Corporation, their successors and assigns, are hereby enjoined and restrained from including any restriction or condition whatsoever in any license granted to others pursuant to the provisions of this Article except that: (1) the license may be non-transferable; (2) a reasonable non-discriminatory royalty may be charged; (3) reasonable provision may be made for inspection of the books and records of the licensee by an independent auditor, or any person acceptable to the licensee, who shall report to the licensor only the amount of the royalty due and payable; (4) reasonable provision may be made for cancel-

lation of the license upon failure of the licensee to pay the royalties or to permit the inspection of the books and records as hereinabove provided; (5) the license shall provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving ninety (90) days' notice in writing to the licensor; (6) the license shall provide that the licensee shall immediately have the benefit of any more favorable terms granted any other licensee; and (7) such other restrictions or conditions as may be approved by the court.

E. Upon receipt of written request for a license under the provisions of this Article, the defendant receiving such request shall advise the license-applicant in writing of the royalty which it deems reasonable and will require to be paid for a license under the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within sixty (60) days from the date such request for license was received by the defendant, the license-applicant may apply forthwith to this Court for the determination of a reasonable royalty; and defendant shall, upon receipt of notice of the filing of such court application, promptly give notice thereof to the Attorney General. In any such court proceeding the burden of proof shall be on the defendant to establish the reasonableness of the royalty requested by it; and the reasonable royalty rates, if any, determined by the Court shall apply to the license-applicant, and shall also apply to all other licensees, under the same claim or claims of the patent or patents, whose licenses provide for payment of a higher

royalty rate than that determined by the Court. * * *

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Article XI

For the purpose of securing compliance with this judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and on reasonable notice in writing at its principal office to any defendant, its successors or assigns, be permitted, subject to any legally recognized privilege: (a) access during the office hours of such defendants, its successors or assigns, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, its successors or assigns, relating to any of the matters contained in this judgment; (b) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters; provided, however, that information obtained by the means permitted in this Article shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States of America is a party, for the purpose of securing compliance with this judgment, or as otherwise required by law.